IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.01.2007

CORAM :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

Writ Petitions Nos.9655 to 9658 of 2000

Sri Ambal Mills Private Limited
represented by its Director
C.D.Menon
28-C, Bharathi Park Cross Road
No.5, Coimbatore - 641 011. Petitioner in all W.Ps

v.

1. The Commissioner of Central
Excise, Coimbatore

2. The Customs, Excise and Gold
(Control) Appellate Tribunal
represented by its Assistant
Registrar, 26, Haddows Road
Chennai - 600 006. Respondents in all W.Ps

Petitions in W.P.Nos.9655 to 9658 of 2000 are filed under Article 226 of the Constitution of India praying for the relief of issuance of writ of certiorarified mandamus and certiorari respectively as stated therein.

For Petitioner : Mr.N.Prasad
For Respondents : Mr.K.Ramakrishna Reddy,ACGSC

ORDER

Writ petitions Nos.9655 and 9656 of 2000 are filed seeking for the relief of issuance of writ of certiorarified mandamus to quash the orders of the second respondent herein in Final Order No.572, 571/99 dated 16.3.1999 and direct the second respondent herein to refer the case under Section 35-G of the Act to this Court. Writ petitions Nos.9657 and 9658 of 2000 are filed seeking for the relief of issuance of writ of certiorari to quash the orders of the second respondent herein in Ref. Order No.101, 100/99 dated 5.10.1999.

2. The case of the petitioner is as follows : The petitioner is a Company, inter alia, engaged in the manufacture of polyester/viscose (PV

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yarn) as well as staple fibre (SF) yarn. On 15.01.1986 when the respondents authorities made an inspection of the godown premises of the petitioner's transporters M/s. Kerala Transport Company situated at Bhiwandi. 263 bags containing 13,150 kgs of man made yarn of polyester/viscose blend of the petitioner company was available. Since the transporters could not produce any documentary evidence to show that the said blended yarn had discharged the central excise duty, the goods were detained. The authorities also took possession of certain documents. Samples were drawn from the detained goods and sent for chemical analysis. On the same day, i.e., on 15.01.1986 the respondents detained 20 bags of polyester/viscose yarn; 3 bags of spun yarn; and 28 bags of spun yarn tex from the processing unit of the petitioner's mill at Dahisar, Bombay. Representative samples were drawn and sent for chemical analysis. The petitioner's mill, on 04.03.1986 produced copies of relevant gate passes under which goods were sent through their transporters – Kerala Transport Company and goods which were available in the processing unit originally cleared from the petitioner's mill at Coimbatore, except lot Nos.769 and 1010. The test report received from the chemical analyst confirmed the description declared by the petitioner's mills in the relevant document. All the lots except lots Nos.769 and 1010 were released. The test report in respect of the two lots did not conform with the petitioner's declaration, inasmuch as the lot No.769 which was declared as polyester/viscose/blend, on testing, was found to be blend polyester/viscose/silk attracting duty at Rs.11.25 per kg vide notification No.50/85. The yarn of lot No.1010 had been declared as 32s blend staple fibre (SF), but the test result showed as polyester/viscose/silk blended yarn attracting duty at Rs.9/- per kg. The duty was paid by the petitioner at the rate of Rs.0.68 paise per kg. The above said two lots were detained on 31.03.1986 and 03.04.1986 respectively. Investigation was conducted which revealed that the petitioner's mill was engaged in the manufacture of excisable goods falling under the erstwhile T.I.18III, 18B, 18E and 68. Their sales for Bombay market was routed through their Bombay office situated at No.195, D.N.Road, Saheb Building, Bombay 1. The goods were transported to Bombay by way of stock transfer. Sales to customers were made by the Bombay office under delivery memos and invoices. From August 1984 onwards one M/s. Commercial Fibres, a sister concern of the petitioner's mill was introduced as the consignment agents for Bombay on 1¼% commission and sales invoices were raised by them. The directors of the petitioner's mill are also partners of M/s. Commercial Fibres.

3. The scrutiny of the records of the Bombay office revealed that they were receiving blended yarn of different blends such as 48/52 P/V (Polyester/viscose) 67/83 P/V 15/85 P/V and SF (Staple Fibre) yarn and acrylic yarn from the mill at Coimbatore. The scrutiny of the purchase invoices of the Bombay office of the petitioner mill revealed that their market in Bombay office was only for blended yarn of polyester/viscose and acrylic yarn. During the year 1982 no consignments of SF yarn appear to have been received by the Bombay office. From 1983, yarn under the

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description of 2/40s S.F. (Staple fibre) yarn also were received by the Bombay office in addition to blended yarn of polyester/viscose 15/85 PV, 48/52 PV etc. The scrutiny of the sales invoices issued during the period from June 1983 onwards by the Bombay office revealed that the description originally shown in delivery memo was 2/40s, 15/85 (shirting or suiting) yarn. But the office copies of the same invoices revealed the goods as 2/40s SF yarn. Thus it appeared that the modus operandi adopted by the mill was to issue proper delivery orders and invoices showing correct description of the goods to their customers and maintain a separate set of invoices having the same invoice numbers and giving the wrong description of the yarn for office purpose. In the invoices, recovered from the traders the duty has been correctly shown as Rs.11.25 per kg as recoverable on the said yarn and the duty is also recovered as such from the traders separately. However, in the invoices issued by the mill in respect of the very same goods lesser rate of duty has been paid as if the goods were SF yarn. Show cause notices were issued on the above said grounds calling for the petitioner to show cause as to why the differential excise duty should not be recovered and as to why the goods should not be confiscated and penalty under the provisions of the Act should not be levied.

4. On adjudication, it was confirmed that the petitioner was adopting a modus operandi of issuing more than one set of bills to the dealers at Bombay and keeping another set of invoice in their Bombay office, which is in tandem with their blend cleared from Coimbatore mill and that the petitioner was adopting different price pattern on their invoice issued from the Bombay branch office stating that the price shown was inclusive of excise duty at a higher rate equivalent to that of PV yarn, whereas the duty paid by their Coimbatore mill was less and was that of staple fibre yarn. Hence, the first respondent by its order dated 04.12.1999 in order No.45/89 confirmed the show cause notice and imposed the differential duty of Rs.44,32,897.61, apart from personal penalty of Rs.1,00,000/- on Shri C.D.Menon, Resident director of the company and Rs.10,000/- each on other two partners of M/s. Commercial Fibres, a sister concern of M/s. Sri Ambal Mills (P) Ltd.

5. Aggrieved by the order of the first respondent, the petitioner filed an appeal to the second respondent in appeal No.E/1724 and E/1725 of 1990 D. The second respondent, by its order dated 16.03.1999 in appeal Nos.571 and 572/1999 rejected the appeal and thereby confirmed the order of the first respondent. Not satisfied with the order of the first respondent, the petitioner filed reference application under section 35G of the Central Excise Act, 1944 to the second respondent to refer the matter to the High Court on substantial questions of law. The reference application has been rejected on the ground that the issue pertained in the case was one of classification, valuation and determination of duty. Aggrieved by the same, the present writ petitions.

6. It is contended on behalf of the petitioner, that the second

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respondent has concluded its finding confirming the order of the first respondent on a totally different reasoning independent of what was stated by the first respondent. Further, the alleged finding either the alleged non maintenance of private records or the alleged industrial practice to maintain proper mixing up records at the blow room stage were findings based on no evidence. The petitioners were not given any opportunity even to prove the negative since that was not the base on which the show cause notice was issued or adjudication completed by the first respondent. In order to buttress this submission, Rule 10 of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982 has been relied on by the petitioner. The Rule provided that the appellant before the Tribunal shall not, except by leave of the Tribunal, urge or be heard in support of any grounds not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or those taken by leave of the Tribunal under those rules, Provided that the Tribunal shall not rest its decision on any other grounds unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground.

7. I am not able to concur with the submission made on behalf of the petitioner. The second respondent has not rested its finding solely on the finding of non maintenance of private records or blow room practice. Further, that reasoning stated is not a conclusive finding. The Tribunal, after setting out all the arguments advanced on either side, has recorded a finding to the effect that the Tribunal could not subscribe to the main defence of the petitioner that the invoice issued describing the product as P/V yarn were actually for SF yarn because of the collusion between their manager Sri Ramchandran and some other customers on the premise that it was difficult to believe that when a company had posted their resident Director Sri C.D. Memon at their Bombay office, in the normal course of duty he would be able to keep full control over the activities of his manager Ramachandran and it was nobody's case that only a few stray invoices were misdescribed due to collusion. The invoices of P/V yarn continued to be raised from 29.04.1983 over a year. Therefore, the Tribunal found that it was hard to believe that such a collusion could be continued over such a period of time under the very nose of an experienced resident Director sitting in the same office. With regard to visual distinction factor raised by the petitioner also the Tribunal has given a finding that the weaving characteristics of the two yarns would be different. The weavers would have found out this change in the quality very soon after weaving the product itself. The Tribunal gave a further reason that it was common knowledge in the textile industry that staple fibre yarn is much weaker yarn than polyester viscose yarn and once the weavers had so found out, they would have seen through this game and stopped purchasing it.

8. While rejecting all the contentions by giving cogent reasons, the Tribunal has stated that the petitioner has not followed the normal practice followed by the spinning mill industry and explained the same by

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observing that the appellant did not give lot number to each category yarn at the blow room stage itself. The user of various fibres in terms of the weight of the blend was established by each mills at the blow room stage itself and the particulars of these would be contained in the lot numbers. Therefore, the lot number has got clear nexus with the raw material accounts and only when the two are read together, could the use of the raw materials and accuracy of the raw material account be examined by the officials. The Tribunal further observed that in the case of the petitioner the time honoured practice was not followed and therefore, the petitioner has deliberately broken the nexus between the use of various fibres at the blow room stage itself and their raw material account and found that that made the accuracy and authenticity of the raw material account highly questionable. This observation was made to explain the contention of the petitioner that the raw materials required to produce 4,55,196 kgs of polyester viscose yarn would be substantial and its quality is not reflected in the raw material account. But for the contention so raised by the petitioner, there was no occasion for the Tribunal to observe the same and thus the said observation is invited by the petitioner. Hence, this Court is of the considered view that the above referred to finding recorded by the Tribunal is not in violation of Rule 10 of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982 and the contention that the second respondent completely rested its finding on a different ground and the petitioner was not given an opportunity to rebut the same falls to ground.

9. Learned counsel relied on the case of Union of India v. M/s. Chaturbhai M.Patel & Co., AIR 1976 SC 712. That was a case filed for damages against the defendant Union of India under section 83(f) of the Railways Act on the allegation that the plaintiff therein despatched consignment containing tobacco at Banaras for Gaya in Bihar for delivery to the plaintiff company and due to negligence of the railways, the identical goods despatched by the plaintiff did not reach the consignee at Gaya, but the goods containing inferior type of tobacco reached there which caused serious loss to the plaintiff. In the above said facts of the case, the Supreme Court upheld the finding of the High Court that fraud like any other charge of a criminal offence whether made in civil or criminal proceedings must be established beyond reasonable doubts.

10. In the present case mis-declaration in respect of two lots has been established by the report of the chemical analyst and other witnesses and it was, to certain extent, admitted by the petitioner himself by contending that the manager in collusion with some traders committed the mistake. Further, the fiscal statute of the present nature contain various measures for taking action against misdeclaration and non declaration and under-valuation for taking remedial measures in the Act itself.

11. It is well settled that under Article 226 of the Constitution of India judicial review can be made in respect of the order passed by any

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Court or Tribunal subordinate to it. But at the same time, that jurisdiction cannot be regarded as converting the High Court as an appellate Court to sit on appeal over the order passed by the Tribunal, when there being no arbitrariness, discrimination or mala fide explicit in the order. So far as the facts of the case is concerned, it is the case of the department that the petitioner, during the period between 29.04.1983 and 07.05.1985 cleared 4,55,195 kgs of polyester viscose under the guise of being staple fibre and thus evaded a huge amount of duty payable to the Government. All due formalities such as issuance of notice, gathering of materials as prescribed under the Act, issuance of show cause notice making available the person from whom statements were recorded for cross examination and after giving due opportunity and following the principles of natural justice. Elaborate adjudication was conducted and adjudication order has been passed on merits. As already stated, to some extent, the petitioner has also accepted that the invoice has been manipulated at the instance of the manager of the petitioner outlet at Bombay in collusion with some of the traders as contended by the Department. That factual finding has been upheld and the only contention, as stated above, raised before the Court was that without giving an opportunity to the petitioner on a new ground the second respondent confirmed the order of the first respondent. That has also been rejected in the earlier paragraphs. Hence, this Court is of the view that the petitioner has not made out any case for interference by the Court in the writ jurisdiction.

12. Now let me come to the writ petitions in respect of rejection of reference. Section 35G(1) of the Central Excise and Salt Act, 1944 provides as follows :

> 35G Statement of case to High Court :-- (1) The Collector of Central Excise or the other party may, within sixty days of the date upon which he is served with notice of an order under section 35C (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), by application in the prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order and subject to the other provisions contained in this section, the Appellate Tribunal shall, within one hundred and twenty days of the receipt of such application, draw up a statement of the case and refer it to the High Court : provided that the Appellate Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the period hereinbefore specified, allow it to be presented within a further period of not exceeding thirty days.

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13. The questions of law which were sought to be referred to are :

1. Whether the Honourable Tribunal was correct in taking on record and entering findings on those facts which was forming neither a part of the show cause notice nor a part of the order in original?
2. Whether the Honourable Tribunal was correct in discussing issues and giving its findings on issues which neither form part of the show cause notice nor the order in original?
3. Whether the Honourable Tribunal was correct in having entered findings of facts incorrectly with reference to its findings at para 9 and para 12?
4. Whether the Honourable Tribunal was correct in confirming the demand in its entirety when evidence if at all was available only against supplies made to 12 dealers?
5. Whether the Honourable Tribunal was correct in confirming the demand on the entire quantum of 4,55,196 kgs., instead of confirming the same only to 55,600 kgs?
6. Whether the Honourable Tribunal was correct in holding that the statements of the witnesses given during investigation would prevail over the depositions given during the cross examination by holding the original statements are written statements and the statements during cross examination are oral statements and therefore written statements would prevail over the oral statements?
7. Whether the Honourable Tribunal was correct in holding the above view on cross examination, even when the original adjudicating authority not even dealt this aspect while passing the order in original ?
8. Whether the Honourable Tribunal was correct in holding that notwithstanding the fact that department could not prove or show the receipt and use of excess raw material of PV fibre to produce 4,55,196 kgs of PV yarn, the demand made by the department is sustainable?
9. Whether the Honourable Tribunal was correct in confirming the demand on the ground that the applicants did not issue lot numbers at the blow room stage, especially when neither the investigation officer nor the order in original nor any adverse statement given by the company officials are available on record?
10. Whether the Honourable Tribunal was correct in holding that the price difference found in the Techno Trend publication between SF yarn and PV yarn is not relevant in view of the lower invoice price of the applicants products, without appreciating the entire evidence on record in the form of invoices for different periods and Techno Trend publications for different periods?

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11.Whether the Honourable Tribunal was correct in upholding the order in original contrary to the settled principles of law, that suspicions however grave cannot substitute proof?

14. On a reading of the very questions of law it is clear that those are all questions of facts, which have been adjudicated and answered by the authorities below. The Tribunal has rejected the reference application on the premise that the issue pertained in the case is classification, valuation and determination of duty and also exemption notification and as such no reference under section 35G of the Act can be made, which finding is in accordance with the statutory provisions.

15. For the reasons stated above, the writ petitions are dismissed. No costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

1. The Commissioner of Central Excise, Coimbatore

2. The Assistant Registrar,
Customs, Excise and Gold (Control)
Appellate Tribunal, 26, Haddows Road
Chennai - 600 006.

+ 4 CCs To Mr.N.Inbarajan, Advocate SR NO. 4395

+ 1 CC To Mr. K.Ramakrishna Reddy, Advocate SR NO. 4644

WP Nos.9655 to 9658 of 2000

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